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ABSTRACT

This paper considers how acceptance of arguments for the rights of parents to choose their children's schools would affect the regulatory and fiscal policies that underlie the existing mixed public/private system. The paper first reviews the existing system, describing state and federal methods for providing financial assistance to private education and the extent to which public and private schools are subject to regulation. School control, teacher hiring and firing, student selection and discipline, and school curriculum are noted as areas where the major differences in regulation exist. The paper next considers the reasons that parents may cite for selecting private education, then explores specific arguments that may be made to support parental claims to a right to choice. Factors affecting the acceptability of these arguments are reviewed, and possible methods for rebalancing the allocation of educational support are examined. The paper next considers constitutional limitations on such changes. The paper concludes with a discussion of changes in regulatory policy that could either restrict or enhance parental choice. The capacity of various agencies to institute change, and the kinds of changes that are permitted in light of court interpretations of constitutional requirements, are reviewed. (PGD)

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Mary-Michelle Upson Hirschoff

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PUBLIC POLICY TOWARD PRIVATE SCHOOLS: A FOCUS ON PARENTAL CHOICE

by Mary-Michelle Upson Hirschoff*

I. INTRODUCTION

Not since the 1920s has our society faced so much controversy about public policy toward private elementary and secondary schools. Then, the major issue was whether private schools should be allowed to exist as alternatives to public schools. That issue was resolved in Pierce v. Society of Sisters,[1] in which the Supreme Court upheld the right of parents to choose private schooling, and thus foreclosed a public monopoly. Today, our mixed system of private and public elementary and secondary education confronts increasing pressures for both fiscal and regulatory change. Most prominent in public debate are proposals for tuition tax credits and voucher systems and challenges to government regulation of private school teacher qualifications, curriculum, and admission practices (especially as the latter affect racial segregation).

Two major public policy issues have replaced the issue of whether private schooling should exist at all: (1) To what extent should government encourage or discourage the choice of private schooling, i.e., what balance between public and private

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schooling should government try to achieve? (2) What differences between private and public schooling should government promote or prohibit?

Despite this change in emphasis, today's debates echo those of the 1920s in many respects. Just as the proponents of the 1920s laws restricting private schools feared that those schools would harm efforts to Americanize the children of immigrants, some argue today that private schools exacerbate social, economic, racial, religious and ethnic divisions within the society and that aiding private schools will increase such undesirable effects. Now as then, advocates of private schooling rest their arguments on the rights of parents to direct their children's education and on the benefits to society of diversity in schooling. Most dispute claims that private schools increase social stratification to any greater degree than do the public schools or that they are less effective in creating good citizens.

One of the major factors that distinguishes today's debates from those of the 1920s is the greater attention paid to the impact of private schools on the quality of education. Proponents of tuition tax credits and voucher systems often assert that private schools are more effective, efficient, and responsive than public schools, and that they serve as a competitive spur to improved public school quality. Some opponents claim that the existence of private schools reduces public school quality. Others (see, e.g., Murnane's PONPO Working Paper #46) argue that increasing the incidence of private

schooling would not necessarily lead to improved educational quality. Proponents of greater state regulation of private schools, on the other hand, charge that many private schools provide an education that is below acceptable levels if the purposes of the compulsory school attendance laws are to be met.[2]

Although some participants in these debates take strong pro-public or pro-private positions, the primary question is what kind of mixed system of public and private schooling we should try to achieve and how. Because individual participants usually focus on specific proposals for change and on only one or a few public policy goals, they fail to address basic questions that need to be asked in order to justify any proposal for change: What are the values that we want a mixed elementary and secondary school system to serve? How do we define them? How well or poorly is the current mixed system serving these goals? The debates also obscure the existence of a much greater range of options for fiscal and regulatory change than those most frequently discussed.

The debates do suggest four categories of goals that encompass possible objectives for our mixed educational system: parental choice, pluralism, social unity and educational quality. They can be defined as follows: Parental choice is simply the ability of parents to choose the kind of schooling they want for their children. Such choice serves parental liberty, the right of parents to direct the education and upbringing of their children. Pluralism includes both diversity in schooling and diversity within the society as a whole. Social unity encompasses two goals. The first is to attempt to assure that

all citizens share the values, attitudes, skills and knowledge that are considered basic to the proper functioning of our society. The second goal is to assure equal educational opportunity, so that one's adult position in society depends on merit rather than accidents of birth, thus eliminating the potential for social division based on perceived unfairness in the competition for jobs and power. Educational quality includes both the goal that all schooling meet minimum standards and the goal that the system as a whole exhibit as high a degree of quality as possible. Quality includes not only instructional effectiveness (what is learned), but responsiveness (what is taught and to whom) and resource allocation and efficiency (the amount of resources devoted to schooling and how efficiently they are used).

This paper focuses on parental choice. The ability of parents to choose private schooling is a fundamental characteristic of any mixed elementary and secondary school system, regardless of the basis on which the system is justified. Among justifications for public policies that favor private schools, parental choice has the longest history. Because Supreme Court decisions grant some constitutional protection to the choice of private schooling, fiscal and regulatory policies that are designed to further other objectives must be judged in part by their effects on parental choice. In addition, parental choice as an independent ground for maintaining or changing our present mixed system does not raise empirical questions as difficult to answer as those raised when the basis of

justification is quality, social unity or even pluralism. Parental choice may be, therefore, the most politically viable basis for justifying fiscal or regulatory change, if evidence indicates that change is necessary to facilitate the choice of private schooling.

Pursuit of parental choice as the primary goal of a mixed system would obviously affect other goals, just as their pursuit would affect parental choice. Actual decisions about maintaining or changing the existing regulatory and fiscal system should be based on judgments about those effects and on efforts to strike a balance among the values that support competing goals. This paper does not, however, address the relationship of parental choice to pluralism, social unity and quality. To achieve analytical clarity, the discussion of parental choice proceeds as though it is the only justification for public policy regarding private schools.

To provide necessary background, the first part of this paper presents an overview of the existing legal structure of the mixed system. The second part analyzes the ways in which private schools may serve parental choice and explores arguments that may be made to support fiscal and regulatory policies toward private schools that facilitate parental choice. It is beyond the scope of this paper to thoroughly survey or examine relevant empirical evidence.

II. THE CURRENT LEGAL STRUCTURE

The Existing System

The purpose of this section is to provide an overview of the legal structure of our mixed elementary and secondary school

system. Because of the federal structure of our government and the primary role of the states in education, it is not a uniform structure. Laws vary from state to state--in sometimes idiosyncratic ways--and general statements will therefore be less accurate for some state systems than for others.3

A central fact is that significant differences exist between public and private schools with regard to both financing and regulation. Public schools are financed through taxation, and are tuition free. Private schools depend primarily on tuition payments, donations, and volunteer or low-priced labor for fiscal support, despite some government assistance.4 Historically, regulations of private schools have not been rigorously enforced or, if enforced, have been minimal in fact.5 Private schools have enjoyed considerable freedom to differ from the more heavily regulated public schools.

About 11 percent of all elementary and secondary school children attend private schools. Approximately 89 percent of these schools are nonprofit.6 As Erickson's contribution to Private Education and Public Policy indicates, private schools follow a variety of different educational approaches and philosophies. Thus, public and private schools in the mixed system are close to the ideal public and private types posited by Levy in the Yale Higher Education Research Group Working Paper #37, with respect to finance and control, and frequently even mission.

Financing

Government assists private schools by exempting them from taxation and by providing services or financial aid. Non-profit private schools are exempt from state property and state and Federal income taxes. Donatious to private non-profit schools may be deducted from the donor's taxable income. Such assistance is provided to a broad range of charitable organizations, including educational and religious organizations. It should be noted that scholars concerned with taxation disagree as to whether exemption from taxation and the deductibility of donations should technically be considered government aid. I use the term assistance for convenience and not to suggest any position on that debate.

Government services and financial aid technically go to private school students or their parents. Typically, such aid is only available to those who patronize nonprofit private schools. (Similar aid is provided to public school parents or students--presumably to counter claims that the aid constitutes an establishment of religion, to be discussed more fully below.) More than half the states provide one or more of the following kinds of aid: bus transportation, textbook loan programs, health services, aid for the handicapped, guidance and counseling, instructional materials loans, psychological testing, remedial instruction and testing.7 Since 1955, Minnesota has allowed a tax deduction for nonprofit private school tuition, textbooks (interpreted to include a wide variety of instructional materials), and transportation.[8]

Federal aid to nonpublic school students is administered by state and local educational agencies unless state law prohibits their participation. The most important program of Federal aid has been Title I of the Elementary and Secondary Education Act of 1965, now Chapter I of the Education Consolidation and Improvement Act of 1981, which focuses on aiding educationally disadvantaged children. It was estimated that 3.8 percent of all private school students participated in this program in the 1979-80 school year, most of them attending Catholic schools. For a history of Federal aid to private school students and a description of Federal aid programs, see the Kutner-Sherman-Williams chapter in Private Education and Public Policy.

Public schools receive about eight percent of their financing from the Federal government. States fund public schools from both state taxes and local property taxes. The latter have been historically the dominant source of funding for public schools, but with pressures for equalization of the resources available to local school districts, state financing has become increasingly important.9 Depending on state law, public schools can charge fees for extracurricular activities and may charge tuition for students residing outside school district boundaries.

Regulation

The interests of the state in achieving the goals of compulsory education are the same regardless of whether the schooling is received in public or private institutions. Because government operates and funds public schools, however, regulations are imposed on public schools that are not imposed on private schools.

(a) Public schools

As government agencies, public schools must comply with limits on government action imposed by the Federal Constitution. Supreme Court decisions of the last few decades have proscribed prayer and other religious exercises in public schools, protected student free speech, required segregated public school systems to desegregate and required that pupil suspensions and expulsions be imposed in accordance with standards of fairness under the due process clause (notice of the charges against the student and an opportunity to hear the evidence and to provide his or her side of the story).[10] Many of the laws now governing the operation of public schools are arguably required on constitutional grounds, e.g., the requirement that public schools be open to all school-aged children within the applicable geographical area.[11] (Unless otherwise indicated, references to the Constitution are to the Federal Constitution. State constitutions place limits on public schools and on government action toward private schools, but vary from state to state.)

What is taught in public schools, how it is taught and how the schools are otherwise operated is determined both by state legislatures and state boards of education and by locally elected or appointed boards of education. It is the general public, through processes of democratic control, to whom the public schools are, at least theoretically, responsible. The current patrons of a particular public school--the parents of its students--may, indeed, prefer a type of schooling different from that being provided. Much of the Federal regulation of public

schools--even that which is directed toward assuring compliance with Constitutional requirements, e.g., desegregation--is tied to Federal financial assistance to public schools.12 State grant programs that are not automatically available to all public schools also typically impose additional regulations on those public schools that receive the grants.

(b) Private schools

Private schools--because they are not government agencies--need not comply with the constitutional requirements imposed on public schools. Constitutional law does affect private schools, however, to the extent that it prescribes limits on government regulation and financial assistance to such schools, to be discussed below.

Private schools are subject to the same general laws that apply to any private business, except to the extent that their educational functions lead to the imposition of additional regulations and their nonprofit status, if adopted, entitles them to special treatment. Partly because private schools have been almost entirely funded by private funds, it appears to have been thought inappropriate to regulate them beyond what was considered necessary to fulfill the purposes of compulsory school attendance laws. Neither tax exemptions for private schools nor aid to private school parents and students commonly have led to greater regulation of private schools, other than the typical requirement that private schools be organized as nonprofit organizations in order to receive the benefits, and the more recently imposed prohibition against racial discrimination.13 Proprietary schools

may (and do) exist; they simply are ineligible for most government assistance.

State requirements imposed on private schools due to their educational function may be enforced directly, through mandatory state accreditation, approval or licensing requirements, and/or indirectly, by finding parents in violation of compulsory education or school attendance laws if they send their child to a noncomplying school. O'Malley's survey of state departments of education found that 18 states have some form of mandatory accreditation, approval or licensure. One of these states, Alabama, requires a license for proprietary, but not for nonprofit schools. A few states exclude church related schools from mandatory requirements. Voluntary accreditation, approval or licensure is available to private schools in many states.[14] If such state sanction is important to attracting patrons, even voluntary programs may have significant regulatory impact.

(c) Comparisons of public and private school regulation

The most important differences in the federal and state regulation of public and private schools involve (1) school control, (2) teacher hiring and firing, (3) student selection and discipline, and (4) school curriculum.15

(1) School control: State laws prescribe eligibility requirements for membership on the public school board, as well as whether the board must be elected or appointed, and whether parents, students or teachers must be involved in some decision-making processes.16 Public school boards are subject to varying degrees of state administrative control. In most states, private schools may remain unincorporated or need only comply with

applicable incorporation statutes. They need not organize as nonprofits. However organized, as long as they meet technical requirements, they are basically free to govern themselves as they wish, i.e. they may select whomever they want to serve on the board, make it self-perpetuating or not, and proceed with or without teacher, parent or student involvement in decisions.

(2) Teacher hiring and firing: State laws prescribe education requirements for public school teachers (teacher certification) and establish rules and procedures governing teacher dismissal, tenure and retirement. Under the Constitution, public school teachers are also entitled to certain free speech and due process rights. Most states now have collective bargaining laws that govern the subjects and process of negotiation with school employees, including teachers. Only thirteen states impose teacher certification requirements on private schools.[17] For the most part, private schools may hire whomever they wish. The terms and conditions of teacher employment are governed by private contract. Although collective bargaining in secular private schools is protected by the National Labor Relations Act, most eligible private school teachers have not unionized.[18]

(3) Student selection and discipline: Public schools are required to educate any child of eligible age living within the geographical boundaries of the school district. They must adopt and enforce rules regarding discipline, suspensions and expulsions following specified procedures. Some of these rules are constitutionally required; others are imposed by state

statute. In many public school systems, however, students are tracked into specified instructional programs; some systems have specialized public schools with admission requirements other than geographical residence. Federal statutes prohibit discrimination on the basis of race, color, or national origin, sex or handicap by schools that receive Federal funds.19 (To the extent that private schools receive Federal financial assistance these laws apply to them as well.)

Private schools are free to teach only those students they wish to admit, although under a Federal statute, 42 U.S.C. 1981, derived from the Civil Rights Act of 1866, they cannot discriminate on the basis of race. Discipline, suspensions and expulsions from private schools are a matter of contract between the school and its patrons.

(4) Curriculum:20 Regulation of the private school curriculum varies from state to state. Some states impose no curriculum requirements on private schools. Others simply delegate the power to prescribe curriculum to state education agencies (including local school administrators charged with enforcing compulsory education laws), often stating that instruction must be "equivalent" to or "substantially the same" as that provided in the public schools. Such standards leave administrators with wide discretion in determining how rigorously private school curriculum should be regulated and there is considerable variation among states in administrative interpretation. Historically, most states have allowed private schools to operate without extensive oversight, possibly in part because traditional private schools were regarded as sufficiently

similar to public schools. Especially recently, however, some state education agencies have rigorously enforced extensive administratively prescribed curriculum requirements on private schools.

A number of states, including some of those that delegate regulatory power over private schools to a state agency, require private schools by statute to teach specific subjects. Typical requirements include instruction in U.S. history, civics, government, the Federal and state constitutions, reading, writing, spelling and arithmetic. Other, less frequently imposed, requirements include health and drug education, instruction in patriotism and good citizenship, and recognition of the accomplishments of women and minorities. Many states require that all instruction (usually excluding foreign languages and sometimes religion) be in English.

The curriculum of the public school is subject to far more extensive state regulation, although, again, variation exists from state to state. Textbooks must often be chosen from a state approved list. Public schools are often required to teach subjects such as sex education, consumer education, and, for students wanting it, vocational education. By state and Federal law, public schools are also required to provide "special education" to mentally and physically handicapped children. Federal law requires public schools that receive Federal funds to remedy any language deficiency that prevents equal participation of non-English speaking children in school programs. Some states specifically require bilingual and even bicultural schooling where appropriate.

III. PARENTAL CHOICE

With this overview in mind, we can now consider how one of the goals for the mixed system, parental choice, may justify maintaining the existing legal structure or adopting options for regulatory or fiscal change. As noted above, the following discussion considers parental choice as though it were the only goal to be served by public policy toward private schools. Such an approach tends to give the discussion a pro-private cast. It is therefore important to recall that actual decisions about maintaining or changing the existing mixed system will require a balancing of parental choice against other goals--pluralism, social unity and quality, each of which will be similarly examined in later work.

In 1925, the Supreme Court held in Pierce v. Society of Sisters[21] that private schools have a constitutionally protected right to exist as alternatives to public schools. In doing so, the Court recognized parental liberty, the liberty to direct the education and upbringing of one's children. Neither Pierce nor other decisions pertaining to the choice of private schools protect complete freedom of parental choice. Pierce permits "reasonable" regulation of private schooling by government. It also does not require any governmental subsidization of the choice of private schooling.[22] Before considering justifications for regulatory and fiscal policies that facilitate the choice of private schooling, it will be helpful to set out a theoretical analysis of how parental liberty--viewed broadly rather than limited by constitutional interpretation--can be served by the

ability to send one's children to private schools. The analysis is supported in part by surveys of private and public school parents reported elsewhere in this volume by Kutner-Sherman-Williams and by Erickson. The survey questions do not, however, exactly conform to the analytical categories used below--categories chosen because they make distinctions that are important in discussing support for parental choice in constitutional law.

How Private Schools Serve Parental Liberty

Parents may choose private schooling for their children because a conflict exists between the available public school and the parents' educational objectives for their children or because the private school offers something that cannot be obtained in the public school. Such choices could be necessary even if the public school system offers a wide range of schooling options. (When permitted by state law, instruction of children in the home by their parents or tutors also serves parental liberty. Full protection, however, must also include the ability to educate one's children in an organized private school with other children.) Although parents are likely to have more than one reason for choosing or wanting to choose private schooling,[23] different reasons support different justifications for maintaining or changing the existing system and therefore warrant separate consideration. Choices made because of conflict will be discussed first.

Conflict

The curriculum, methods of instruction or even general atmosphere of the public school may conflict with parents'

religious beliefs or with their secular values--political, moral or cultural in nature.24 As Erickson's chapter in Private Education and Public Policy notes, the growth of Fundamentalist schools in recent years is largely explained by conflict between the religious beliefs of Fundamentalist parents and the atmosphere and curriculum of public schools. The private school serves as an escape from the public school, and in most cases it is not necessary that the private school do anything to affirmatively assist parents with their educational objectives for their children. It need only do nothing to hinder them.

Conflicts may also occur on pedagogical grounds--because the child's program of study or the instructional methods are opposed by the parents as inappropriate for their child. For example, a child may be put in a general or vocational track rather than college preparatory against the wishes of the parents, or a disciplinary method or approach to the teaching of reading may be used that the parents believe to be ineffective or even harmful to their child.

No conflict

In the absence of conflict, parents may choose private schooling for substantive and non-substantive reasons. Substantive reasons include the ideas, values, skills, attitudes, and knowledge that a school seeks to impart to its students. Nonsubstantive reasons are concerned with all other characteristics of schooling.

(a) Substantive reasons

First, among substantive reasons, parents may choose a private school to assist them in inculcating their religious beliefs and political, moral, or cultural values in their children. Public schools can neither provide religious instruction nor allow school prayer. (Teaching about religions in the context of such courses as comparative religion, history, civics and ethics is, however, permitted.) Even though public schools are not as restricted in teaching secular values as they are in teaching religious beliefs, most commentators believe that they must, at least as to controversial issues, maintain neutrality.25 Such a neutrality would not be as helpful to parents seeking to inculcate specific values in their children as would a private school that could actively espouse those values.

As to both religious and secular value inculcation, parents might be able to supplement public schooling with after school hour instruction. Complete substitution of private for public schooling is not absolutely necessary in the absence of conflict with the public schooling. Nonetheless, parents may legitimately believe that truly effective inculcation of their religious or secular values requires that those values permeate most or all of the schooling experience.

Other substantive reasons include obtaining a particular course of instruction, e.g., German or swimming, the use of a different educational method, or adherence to a particular educational philosophy. In the first case, supplementary instruction after public school hours might suffice. There is, however, a natural limit on the number of hours available for

instruction after school, so that the more deficient the public school in terms of desired instruction, the more necessary the substitution of a private school would be.

(b) Non-substantive reasons

Each of the non-substantive reasons for choice of private school requires substitution of private for public schooling rather than supplementation of public schooling. The first of these reasons is perceived superior instructional quality. Factors that parents may consider indicative of that quality include the qualifications of the staff, better physical facilities, and better enforcement of disciplinary rules. There need be no difference between the public school curriculum, its methods of instruction or educational philosophy and that of the private school chosen. Second, choice may be based on the desire to have one's children attend school with certain kinds of other children. Such a reason for choice may stem from a belief that a particular mix of students is necessary in order not to contradict in practice the ideas or values that are being taught at home and in school, or that the mix of students will lead to more effective schooling for one's children. (See Murnane's PONPO Working Paper #46 regarding the effect of student body composition on achievement.) Private schools can control student body characteristics and hence the school atmosphere through student selection and discipline.

Third, parents may want a different kind of organizational control over school policies and school administration than that of the public school, e.g., more parent or student involvement in

policy making, more teacher autonomy. Fourth, school location may be the reason for the choice of a private school. In the case of boarding schools, parents may want their child to live away from home for their own convenience or because they think it important for the child's development. Day schools may be chosen because their location is closer to home or otherwise judged more convenient than the available public school. A fifth possible reason is a family tradition of sending children to private school.

Public Policy and Parental Choice

The discussion that follows explores arguments that may be made--to judges, legislators or administrators, as appropriate--to support fiscal and regulatory policies toward private schools that serve parental choice. It should be noted, however, that parents may be hampered in sending their children to a private school that serves their educational objectives simply because there are not enough like-minded parents and teachers to form such a school. Neither regulatory nor fiscal policy changes could assist them. In addition, support for increased fiscal aid to private schools may depend on what regulations could be imposed on private schools--either as a condition for receipt of the aid or directly. Nonetheless, the discussion that follows considers fiscal and regulatory policies separately.

Parental Choice and Fiscal Policy

Although the Constitution does not require any government financial assistance to facilitate the choice of private schooling, Supreme Court decisions are a source of constitutional values that can be used to support arguments for maintaining the

existing system of financial assistance or increasing that assistance. Supreme Court decisions also limit the nature and perhaps the degree of financial assistance that the government can give; these limitations will be considered at the end of the following discussion.

(a) Justifications for aiding parental choice

The existence of conflict between public schooling and parents' religious, cultural, political or moral values is probably the strongest justification for maintaining or increasing financial aid to those who choose private schooling. The Pierce opinion clearly expressed concern over the possibility of indoctrination when it stated that "[the] fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."[26] In Wisconsin v. Yoder,[27] the Court recognized that requiring Amish children to be instructed in a public school curriculum that conflicted with the tenets of the Amish religion unconstitutionally burdened the parents' free exercise of religion. As I have argued elsewhere, principles of neutrality toward religion and non-religion on the part of government should lead to an equal concern with a public school curriculum that conflicts with parents' deeply held secular values. Since children in public school constitute a captive audience of the government, the ability to escape to a private school is an important protection against the possible indoctrination of children in values opposed by their parents. Such indoctrination

conflicts with the protection of freedom of conscience that is implicit in First Amendment guarantees of freedom of speech and the free exercise of religion. It also conflicts with the First Amendment's implied protection of a marketplace of ideas.[28]

Pedagogical conflicts--objections to a course of instruction, educational philosophy or method of instruction that parents consider harmful to their child's preparation for a future career and lifestyle--do not pose risks of indoctrination and thus do not raise concern about harm to First Amendment values. Nevertheless, choice of occupation and lifestyle are important liberties under our system of government[29] and the inability of parents to send their child to a private school in order to avoid having their child instructed in a way that may limit the child's choice of occupation and lifestyle is certainly a cause for concern.

All of the reasons for choice that do <u>not</u> stem from conflict with the available public schools may be regarded as bearing some relationship to freedom of association--the right of people to join together in groups to further shared ideas, values, beliefs and goals.30 Each is related to the general parental liberty to direct the education and upbringing of one's children. Some reasons, however, are more closely tied to the central concerns of the First Amendment than others. In fact, <u>Runyon v. McCrary</u>, to be discussed later in connection with regulatory policies, suggests that the communication of ideas, values and knowledge has a greater degree of constitutional protection than methods of instruction or other school characteristics.

Obviously, parents choosing a private school in order to help them inculcate their religious beliefs are engaging in the free exercise of religion. The choice of private schools to help instill secular values in one's children may be regarded as an exercise of freedom of speech, important to the protection of a free marketplace of ideas. When a private school is chosen in order to obtain courses, methods of instruction or adherence to an educational philosophy not provided as an option by the available public school, that choice also may be regarded as an exercise of freedom of speech. Factors related to instructional quality, student body characteristics and organizational control as reasons for the choice of private schooling arguably affect the success with which ideas, skills and values are taught. In addition, both student body characteristics and organizational control may be critically interrelated with the provision of schooling that differs in content and method from that of the public school. Independent of their impact on school effectiveness, content or method, however, none of these reasons bears a significant relationship to freedom of speech or the free exercise of religion, just as convenience of location and family tradition do not.

If all reasons for choice of private schooling are considered adequate justification for aiding the choice of private schooling, then the only empirical information needed to determine whether a change in fiscal policy is necessary is the extent of the financial burden on existing private school parents and the extent to which parents who would like to send their children to private school are precluded from doing so for

financial reasons.31 If, however, only some reasons are considered sufficient justifications for aiding the private school choice, then one must also ascertain which reasons for choice would be served by financial aid.

Deciding whether or not there is need for greater financial assistance also involves judgments about the extent of the fiscal burden that parents should bear in choosing private schools.32 In addition, consideration should be given to whether fiscal support feasibly could be limited, in some cases, to supplementation of the public school program with after school hour private instruction. When the reason for choice stems from conflict with the available public school, the strength of parental objection undoubtedly varies from sharp disagreement to only mild disapproval. It is likely that the stronger the degree of felt conflict, the greater the efforts parents will have made to provide alternative schooling. It is possible then that virtually all parents whose choice of private schooling stems from significant (to them) conflict with the available public school already do send their children to private school (unless they are barred by insufficient financial resources or no private school alternative exists for them). If this is the case, fiscal change to lighten their burden could be justified, but there would be no need for aid that would significantly increase the numbers of students attending private schools.

(b) Options for fiscal change

A wide range of fiscal options could be adopted by state legislatures and, in most cases, Congress, to serve parental

choice. Public discussion has focused primarily on tuition tax credits, voucher systems and, more recently, tax deductions for private and public school expenses, including private school tuition. Both tuition tax credit and tax deduction proposals have limits on the amount of credit or deduction from taxes that could be claimed. Under most voucher proposals, the voucher could be used to attend either a public or private school. The different voucher systems proposed vary in the amount of the voucher, whether schools accepting voucher students must accept it in full payment of tuition, whether the voucher varies according to family financial need (income and number of children), and the extent of regulation imposed on participating private schools. Some voucher proposals would extend only to "disadvantaged" students, to be used in public or private schools. For a more extensive discussion of voucher and tuition tax credit proposals, see the Kutner-Sherman-Williams chapter in Private Education and Public Policy.

Other fiscal options for change include scholarships for use only in private schools by specified categories of students, e.g. needy, talented, handicapped;33 increasing the tax benefits of donations to private schools; increasing the number and amounts of grant programs to private school students; making more services available to private school students; and increasing the geographical boundaries in which free bus transportation to private schools is available.

In addition, the financing of public schools could be changed. Tuition could be charged at public schools in order to eliminate the competitive advantage of public schooling.

(Presumably local property taxes would be significantly reduced, and subsidies could be given to those who could not pay tuition.) Short of this, public schools could charge fees for extracurricular activities and certain courses (especially those that are not directly linked to the purposes of compulsory school attendance laws).[34]

All of the options for fiscal change mentioned so far would tend to encourage the choice of private schooling. To discourage that choice the obvious options would be to reduce or eliminate existing forms of aid. If the choice of private schooling is discouraged by the current financing of public schools--free of tuition, wholly tax-supported--this negative impact could be increased by more spending on public schools, supported by higher taxation.

(c) Constitutional restrictions on government aid to private schools

Assuming that fiscal aid is appropriate, any system of government financial assistance that facilitates the choice of private schooling must abide by another clause of the First Amendment, the prohibition against establishment of religion, which is applicable to both state and Federal governments. Since its 1971 decision in Lemon v. Kurtzman, the Supreme Court has used a three part test to determine whether statutes violate the establishment clause. To be upheld, a statute must meet the following criteria: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .;

finally, the statute must not foster `an excessive government entanglement with religion.'"[35]

Ironically, then, even though the First Amendment's protection of the free exercise of religion supports the choice of private schooling by parents who want religious instruction for their children or wish to avoid conflicts between public schooling and their religious beliefs, such a basis for legislative changes designed to facilitate that choice would be considered to violate the First Amendment's prohibition against an establishment of religion under the Lemon v. Kurtzman standard. It is, however, not difficult to frame legislation designed to facilitate choice of religious schools in terms of secular purpose, so long as the aid is available to those choosing non-religious schools. The more difficult standards to meet are the primary effect and entanglement criteria. Their application to attempts to assist the choice of private schooling is discussed in the following paragraphs.

When the aid under challenge has been in the form of materials, equipment or services to private school students (or their parents), it has not been fatal to the constitutionality of the legislation that most of the recipients of the aid attend religious schools. In the words of Professor Laurence Tribe, the critical distinction has been between "permissibly separable aid . . . [and] aid impermissibly integrated into the parochial school."[36] Thus, salary supplements for parochial school teachers or aid that goes directly to the parochial schools themselves is prohibited, but secular textbook loan programs for individual student use and the provision of bus transportation to

and from school similar to that provided public school students is acceptable. Parochial schools cannot control the content of the services provided at public expense, nor those who supply the services, and contact between the providers of the services and the children and school officials must be minimal. Some services must be provided off the parochial school premises.

All such aid may be regarded as reducing the burden on those already choosing private schooling to the extent that it has any impact on parental choice. Monetary aid in the form of tax credits or tax deductions would also reduce the burden on those choosing private schools, but might also serve to enable some parents to send their children to private schools who might otherwise not be able to do so. In dealing with this type of aid under the Lemon v. Kurtzman standard, the Court appeared to find it constitutionally fatal for the aid to go primarily to parents who chose religious schools for their children.[37] The Court's recent decision in Mueller v. Minnesota,[38] however, suggests that so long as aid is also given to public school students, the fact that private religious school students benefit disproportionately is of no concern.

In the Mueller case, the Court upheld a Minnesota tax deduction plan that allows both public and non-profit private school parents to deduct from their gross income for state income taxes up to $500 for each dependent in grades Kindergarten through 6 and $700 for each dependent in grades 7-12, for expenses on tuition, secular textbooks (interpreted to include a wide variety of instructional materials), and transportation.

Those challenging the law had submitted uncontroverted statistical evidence that private school parents benefited much more than public school parents because of the former's greater expenditures on deductible items (i.e. tuition) and that 96% of private school children attended religiously affiliated schools. The Court held that this was in no way determinative of the constitutionality of what they termed a "facially neutral law." Although the Court also noted that this deduction was only one among many tax deductions and cited the traditional rule of deference to legislative classifications in tax statutes in justifying its decision upholding the Minnesota law, the opinion does suggest that other possible options for increasing financial assistance to facilitate the choice of private schooling might be upheld, even if they are not tied to tax statutes.

It appears to be critical that both public and private school students are equally entitled to participate, even though the actual choices of schooling show an increase in the number or percentage of students attending religious schools. It was important to the Court's decision that the choices were made by individual parents, thus removing the possibility of conferring the "`imprimatur of State approval' . . . on any particular religion, or on religion generally." Despite the fact that the opinion eschews consideration of factual information about who benefits most from the statutory scheme, the Court also noted that any "unequal effect . . . can fairly be regarded as a rough return for the benefits [providing an educational alternative, wholesome competition with public schools, relieving the tax burden incident to the operation of public schools] . . .

provided to the state and all taxpayers by parents sending their children to parochial schools."

Parental Choice and Regulatory Policy:

There are three ways in which private school regulation could interfere with parental choice. First, it could prohibit private schools from providing educational choices that parents want. Second, private schools may be required to provide instruction, use methods, or staff the school in ways that conflict with parental educational objectives, values and pedagogical preferences. Third, regulation may increase the cost of private schooling, making it more burdensome or impossible to pay tuition to send one's child to private school.

Possible changes that might aid parental choice include decreasing the number of subjects that must be taught, eliminating any regulations that prescribe methods of instruction, class size, or teacher certification requirements for private schools, and substituting testing of private school students for all direct regulation. At least one form of additional regulation might aid parental choice--requiring disclosure of information to prospective patrons. Government imposed admission requirements and disciplinary standards could aid the choice of some (by making private schools accept or retain students they would otherwise exclude), but deny parental choice to those who prefer different requirements or standards.

Such regulatory changes could be adopted by legislative or administrative action or, in some cases, could result from judicial decisions.

(a) Legislative and administrative change

From the standpoint of constitutional law, no regulation of private schools is required (unless government assistance triggers application of the state action doctrine, discussed below). Thus, legislators and, within their delegated authority, administrators, are free to eliminate some or all regulation of private schools if they are successfully persuaded to do so by arguments that particular regulations impede parental choice. Such arguments would draw upon the previously discussed constitutional values that are served by parental choice and demonstrate how specific regulations interfere with particular reasons for choice.

(b) Judicial change

Courts can invalidate administrative regulations on the ground that they exceed the scope of authority delegated to the administrator by the legislative body or that the delegation of power is unconstitutional.39 The discussion that follows focuses on the extent to which regulations (whether statutory or administrative) may be held unconstitutional on the ground that they violate constitutionally protected rights related to the choice of private schools. There are two categories of regulation--direct regulation and regulation that is tied to the receipt of government aid. Constitutional law regarding direct regulation will be considered first.

Direct regulation:

It is clear that some regulation of private schools is permitted. Even though the Pierce case did not involve

regulation, but the prohibition of private schooling, the Court specifically stated:

> No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.40

The same court's earlier decision in Meyer v. Nebraska,41 decided in 1923, struck down a state law prohibiting the teaching of German in private schools prior to the eighth grade, saying it was an unreasonable interference with parental liberty and the rights of teachers to teach. In Runyon v. McCrary42 the Court upheld a prohibition against racial discrimination by private schools. Pierce and other Supreme Court decisions suggest that private schools may be required to teach reading, writing, and arithmetic and to provide instruction in our system of government, as well as to assure that students learn English.[43] It is also clear that direct regulation that is so extensive as to leave virtually no freedom to private schools is unconstitutional.44

There are two different constitutional bases for challenging direct regulation. The first is a claim that the regulation is "unreasonable" within the meaning of the Pierce and Meyer cases, a claim that would rest for doctrinal support not only on those decisions but on First Amendment protection of freedom of speech, and the implied protection of freedom of association, the marketplace of ideas and freedom of conscience. The second basis

is a claim that technically concedes the reasonableness of the regulation in general, but maintains that the regulation burdens the free exercise of religion protected by the First Amendment.

In Wisconsin v. Yoder,45 decided in 1972, Amish parents claimed that the last two years of compulsory school attendance in a secondary school conflicted with tenets of the Amish religion and threatened their ability to inculcate their religious values in their children and to preserve the Amish way of life. The Court recognized that such a conflict could destroy or severely hamper the continued existence of the Amish community and held that the state's interests in requiring two additional years of schooling in a regular secondary school did not meet the following standard: "only those [state] interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." The Court found evidence that the conventional education already received by the Amish children and the informal vocational education they would pursue in the Amish community satisfied the state interests in preparing children for citizenship and assuring a "self-reliant and self-sufficient" populace. The case can be interpreted to entitle private religious schools to exemption from any private school regulation that burdens the free exercise of their religion under the First Amendment, unless the state interest is sufficiently compelling to override the burden.

Runyon v. McCrary,46 decided in 1976, is the most recent Supreme Court decision to provide some guidance about constitutional limits on direct regulation of private schools,

when challenged on the ground that it unreasonably deprives parents of their liberty to direct the education of their children. In that case, the Court upheld--against such a challenge--a Federal statute interpreted to prohibit racial discrimination by private schools. The opinion repeatedly states that the regulation in question does not prevent the schools from inculcating the values and standards desired by parents, thus reaffirming Meyer's restrictions on the prohibition of instruction. It does not, however, indicate what courses may be required and what may not. The opinion also repeatedly distinguishes between practices and value inculcation. The Court did not find any conflict between the prohibition of the practice of racial discrimination and the ability of parents to inculcate the value of racial segregation. This suggests that the Court would uphold all non-curriculum regulation of private schools, such as teacher certification, pupil-teacher ratios, admissions requirements, standards of discipline, and even methods of instruction. As I have argued elsewhere,[47] however, prior precedents and the possibility that some non-curricular characteristics of schools can affect what is taught, caution against such a broad reading of the opinion. In addition, the state's interest in eliminating racial discrimination is itself supported by constitutional guarantees. Other regulations are unlikely to be so supported and thus the state's interest in them may not be sufficiently compelling to override evidence that the regulations unreasonably prevent parents from providing their children with the kind of education they want for them.[48]

Regulations tied to receipt of government benefits:

There is even greater uncertainty about constitutional law as it pertains to government regulation of private schools because they receive government benefits. At one extreme, constitutional law might lead to judicial imposition of regulation on private schools under the state action doctrine, depending on the nature and extent of the aid and the accompanying regulations. If "state action" is found, the private school would be required to adhere to some of the same constitutional constraints applicable to public schools.49 In addition, certain regulations attached to aid that goes to religious private schools might lead to invalidation of the aid altogether because of the "entanglement" between church and state their administration would require. The following discussion focuses on whether some conditions on aid would be considered unconstitutional, so that the regulations, but not the aid, would be invalidated.

In Bob Jones University v. United States,50 the university and a private elementary and secondary school that engaged in racially discriminatory policies based on religious beliefs claimed that an Internal Revenue Service (IRS) policy that denies tax-exempt status and charitable deductions for contributions to schools that discriminate on the basis of race unconstitutionally burdened their free exercise of religion. The Court rejected that claim because, despite the substantial impact that denial of tax benefits would have on their operation, it would "not prevent those schools from observing their religious tenets," the

governmental interest was clearly compelling, and "no less restrictive means" were available to accomplish it.[51]

Most of the Court's opinion concerns the question whether the IRS had the authority to impose the regulation under existing legislation. It found that the statute required tax exempt institutions to "serve a public purpose and not be contrary to established public policy." That public policy, it later said, must be "fundamental," a finding it easily made for public policy against racial discrimination. The opinion suggests that private schools might be required, by the IRS, and certainly by Congress, to abide by other fundamental public policies in order to be eligible for tax-exempt status.

In Grove City College v. Bell,[52] the Court rejected a First Amendment challenge to a requirement that, if students enrolled at the college received Federal education grants, the college must comply with a Federal regulation designed to prohibit discrimination on the basis of sex. (The case is best known for its holding that the statute in question prohibited discrimination only in the assisted program, not in college operations as a whole.) The Court said: "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." Although the brief consideration that the Court gave to Grove City's claim suggests that it would find almost any regulation reasonable that could be avoided simply by not accepting the aid, this statement does leave open the question of what is reasonable regulation. As finally interpreted, the regulation in this case required only that the financial aid

office not discriminate on the basis of sex and that the college sign an Assurance of Compliance to that effect. Had the regulation prohibited the teaching of certain subjects, for example, a stronger claim that the regulation violated First Amendment rights could be made. In addition, prohibition of sex discrimination is arguably close to prohibition of racial discrimination in constitutional significance, so that, even though the Court did not engage in any balancing of the government and private interests, the importance of the government interest might have influenced the decision. Thus, it might be possible to successfully challenge other government conditions on the receipt of aid in the future. Arguments would have to be made on the basis of general principles of constitutional law informed by constitutional protections of parental choice. The development of these arguments is, however, beyond the scope of this paper.

IV. CONCLUSION

Both the differential regulatory treatment of public and private schools and fiscal policies toward private schools undoubtedly permit a significant number of parents to choose the kind of private schooling they want for their children. If fiscal or regulatory change is to be justified on grounds of parental choice, evidence must exist that regulations hamper parental educational choices that ought to be permitted or that financial burdens make such choices difficult or impossible.

Even if evidence indicates that more fiscal support to the choice of private schooling is needed in order to serve parental

liberty, adoption of fiscal options to that end without careful consideration of the regulatory consequences could lead to less rather than more parental choice. Although Supreme Court decisions suggest that greater government financial assistance to the choice of private schooling may be constitutionally permissible, they also raise questions about how much protection the Constitution affords against regulations imposed on private schools directly or as conditions on receipt of aid, even if they significantly interfere with parental choice. Adoption of increased fiscal support would undoubtedly be a result of political compromises that recognized other objectives for the mixed system--quality, social unity, or even pluralism. Thus additional regulations of private schooling probably would be attached to receipt of the aid. The greater attention to private schools might also lead to the adoption of additional direct regulation. There is also always the possibility that aid would trigger judicial imposition of constitutional constraints on private schools under the state action doctrine.

Particularly with regard to fiscal change, then, one might conclude that the present legal structure of the mixed system--with perhaps minor adjustments--maximizes parental choice more than would the major changes on which public discussion usually focuses.

Footnotes

Due to space limitations and the primarily non-legal audience to which this book is addressed, the notation is less extensive than is common in law review articles.

1. 268 U.S. 510 (1925). Pierce held unconstitutional, as an unreasonable interference with the liberty of parents and guardians to direct the upbringing of their children, an Oregon law that required every parent, guardian or other person having control of a child between the ages of eight and sixteen years to send that child to a public school. For a history of the case, see Tyack, "The Perils of Pluralism: The Background of the Pierce Case," 74 Amer. Hist. Rev. 74 (1968).

2. This appears to be behind the impetus for more rigorous regulation of private schools and is mainly directed at Fundamentalist Christian schools.

3. Except as otherwise indicated, statements about the law are supported by the author's independent legal research and by Goldstein, Law and Public Education (1974) and Kirp, Yudof, van Geel and Levin, Educational Policy and the Law (2nd ed., 1982).

4. Kraushaar, American Nonpublic Schools: Patterns of Diversity (1972), p. 206, Table 5. A few schools also have endowment income, p. 208.

5. Elson, "State Regulation of Nonpublic Schools: The Legal Framework," in Public Controls for Nonpublic Schools, pp. 123-25 (D. Erickson, ed., 1969); Stolee, "Nonpublic Schools: What Must They Teach?" 92 Schools & Society 274, 276 (1964).

6. This estimate was calculated using data from the United States Census of Other Service Industries, 1977, which counted

2,237 proprietary (taxable) elementary and secondary schools among the non-sectarian schools that it surveyed, and data from the National Center for Education Statistics for 1976-77, which gave 20,084 as the total number of all private elementary and secondary schools. (Since some nonprofits are not tax exempt because they practice racial discrimination, the percentage of nonprofits may be slightly higher. In addition, if the NCES total does not include the same number of proprietary schools as the Census figure, the percentage would vary accordingly.) U.S. Department of Commerce, Bureau of the Census, 1977 Census of Service Industries, Other Service Industries, Parts 1-4. Geographic Area Studies (SC77-A-53); U.S. Department of Health, Education and Welfare/Education Division, National Center for Education Statistics, Bulletin NCES 80-B01, Selected Public and Private Elementary and Secondary Education Statistics, School Years 1976-66 through 1978-79, Table 1.

7. Department of Education, School Finance Project, Vol. 2, Private Elementary and Secondary Education (1983), p. 21.

8. Minn. Stat §290.09(22) (1982). Education Week reported on March 7, 1984 that thirteen states were considering similar laws. Vol. III, No. 24, pp. 1,18.

9. In 1970, the national average for state contributions to public school district budgets was 40%. In 1981-82, the average state contribution was 49%, with local government providing an average of 42.9% and the Federal government 8.1%. In that year, however, the growth in local revenues was greater than in state

revenues. Caldwell, "State Aid to Education Wanes, Reversing Decade-Long Trend," Education Week, Vol. 1, No. 37, pp. 1, 12.

10. See, for example, School District of Abington Township v. Schempp, 374 U.S. 203 (1963); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969); Brown v. Board of Education, 347 U.S. 483 (1954); and Goss v. Lopez, 419 U.S. 565 (1975) respectively.

11. See Plyler v. Doe, 457 U.S. 202 (1982) (holding unconstitutional the exclusion of children of illegal aliens from free public education in Texas).

12. See Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d (1970) (authorizing termination of Federal financial assistance to recipients that discriminate on the basis of race, color or national origin).

13. Indeed, Minnesota, with possibly the most generous assistance to the choice of private schooling, is among those states that regulate private schools the least. van Geel, Authority to Control the School Program (1976), Figure 8-1, p. 155. Atypically, while a state commission was studying sex education in Florida, tax exempt (nonprofit) schools were not permitted to teach human reproduction. Florida Sec. 233.02 (repealed).

When government becomes virtually the sole source of private school funding, however, extensive regulation appears to become the norm. In New York State, for example, where tuition at schools for the handicapped is fully funded by government, such private schools are now extensively regulated. See Rebell, "Educational Voucher Reform: Empirical Insights from the

Experience of New York's Schools for the Handicapped," The Urban Lawyer, Vol. 14, No. 3, Summer, 1982, pp. 453-461. Arguably, however, such regulation may be justified on the ground that these private schools are being used by public schools to fulfill the public schools' responsibilities to the students, a claim that could not be made when aid is given in order to facilitate parental choice.

14. O'Malley, Survey of State Regulation of Private Schools (Florida State Department of Education, unpublished, 1980-81). However, van Geel cites statutory authority in support of his statement that twenty-seven states require registration and approval of private schools. Authority to Control the School Program (1976), pp. 153-54.

15. Private schools must, of course, comply with generally applicable laws such as building, zoning, fire and health codes, and with laws governing charitable solicitations and preventing consumer fraud, which are inapplicable to public schools. Public schools, unlike private schools, are usually required to provide free transportation to their students.

16. An Indiana statute requires an advisory committee made up predominantly of teachers and parents to make recommendations regarding the selection of textbooks to the superintendent, who in turn makes recommendations to the school board. Ind. Code Ann. §20-10.1-9-21 (Burns Supp. 1984).

17. These range from requiring that the private school teacher have a bachelor's degree to mandating complicance with all requirements imposed on public school teachers, e.g.

education courses and practice teaching. Two of the states apparently do not enforce their requirements. O'Malley, Survey.

18. In National Labor Relations Board v. The Catholic Bishop of Chicago, 440 U.S. 490 (1979), the Supreme Court held that the NLRB did not have statutory authority over religious schools as employers of lay teachers, even though they also teach secular subjects. According to Robert L. Smith, Executive Director of the Council for American Private Education, there is virtually no unionization of teachers within the secular area of nonprofit private education. However, in about a dozen major Catholic diocesan school systems, there are teachers unions.

19. Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d (1970); Title IX of the 1972 Education Amendments, 20 U.S.C. §§1681-86; §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 respectively. Although Title IX explictly permits single sex elementary and secondary schools, single sex public schools may violate the equal protection clause of the 14th Amendment to the Constitution.

20. This summary of the regulation of private and public school curricula is based on the previously cited Elson article and the van Geel book (an extensive treatment of curriculum regulation in both public and private schools) and on research done by Mary Curran while she was a student at the Yale Law School.

21. 268 U.S. 510 (1925).

22. For an argument that First Amendment principles require a voucher system, see Arons, "The Separation of School and State: Pierce Reconsidered," 46 Harv. Educ. Rev. 76 (1976). In Norwood

v. Harrison, 413 U.S. 455 (1973), however, the Court stated that Pierce "said nothing of any supposed right of private and parochial schools to share with public schools in state largesse . . . ." No government funding of abortions is required, even though (like the right to send one's children to private school) the right to have an abortion is constitutionally protected from unreasonable government interference. Harris v. McRae, 448 U.S. 297 (1980).

23. The full survey of reasons for choice reported in part by Kutner-Sherman-Williams in Private Education and Public Policy show that when asked for very important reasons rather than the most important reasons for the choice of private schooling, parents cited the following: staff (87.7%); discipline (87.1%); academic standards (84%); civil moral values (75.1%); courses (62.4%); religious instruction (61.5%); convenience (25%); mix of student backgrounds (22.3%); and desegregation (12.9%). 33.7% cited child's desire, but there is no indication of the child's reason, and 16.7% cited finances. Department of Education, School Finance Project, Vol. 2, Private Elementary and Secondary Education (1983), p. 54.

24. The parents could value neutrality as to all secular and religious beliefs and therefore be in conflict with a public school that was not sufficiently neutral.

25. See, for example, West Virginia State Bd. of Education v. Barnette, 319 U.S. 624, 637 (1943); Nahmod, "Controversy in the Classroom: The High School Teacher and Freedom of Expression, 39 Geo. Wash. Law Rev 1032, 1042-50 (1971); Van Alstyne, "The

Constitutional Rights of Teachers and Professors," 1970 Duke L. J. 841, 856-57.

26. 268 U.S. at 535.

27. 406 U.S. 205 (1972).

28. For a complete discussion of this argument in a different context, see Hirschoff, "Parents and the Public School Curriculum: Is there a Right to Have One's Child Excused from Objectionable Instruction?," 50 S. Cal L. Rev. 871, 897-941 (1977). A right to be excused from specific public school instruction is not as effective in avoiding indoctrination as attendance at a private school would be.

29. Selective Draft Law Cases, 245 U.S. 366, 378 (1918); Tribe, American Constitutional Law, §15-12,14,16 (1978).

30. Freedom of association is implied from First Amendment protections of freedoms of speech, press, petition and assembly. See Tribe, American Constitutional Law § 12-23.

31. The full School Finance Project survey showed that 23.5% of those parents who had transferred their children from a private to a public school did so because of cost. (p. 55). Among public school parents who had considered transferring their child to a private school, 57.1% cited cost as a reason for not doing so. (p. 56). Department of Education, School Finance Project, Vol. 2., Private Elementary and Secondary Education (1983).

32. When asked to describe the financial burden placed on them by private school costs, respondents to the School Finance Project survey reported as follows: none (21.2%); light (19.8%); moderate (37.6%); and heavy (21.4%). (p. 58).

33. Parents of handicapped children who now send their children to private schools at public expense must receive the approval of the public school board before enrolling, thus the funding is not a true voucher or scholarship.

34. E. G. West was an early advocate of user fees for public schools. See "An Economic Analysis of the Law and Politics of Nonpublic School Aid" in Nonpublic School Aid (E. G. West, ed., 1975), pp. 23-26. Erickson suggests, in his contribution to Private Education and Public Policy, that charging fees can help assure parental interest and involvement in schooling.

Faced with increased costs, declining enrollments and taxpayer reluctance to raise local property taxes, a few public school systems have begun to charge fees for extracurricular activities and non-required courses. "Looking Ahead, Town Uses Student Fees, Not Taxes, to Cover School Frills," N.Y. Times, August 31, 1981, p. A-10, col. 1; "Extracurricular Activities Get `Extra Expensive,'" N.Y. Times, Jan. 10, 1982, Sec. 13, p. 49.

35. 403 U.S. 602, 612-613 (1971). Under these criteria, aid to religiously affiliated colleges and universities has been upheld that would not be upheld if given to parochial elementary and secondary schools. The former are assumed not to have religious indoctrination as a substantial purpose. Tilton v. Richardson, 403 U.S. 672 (1971). Some states have more restrictive limits on government financial aid to private, particularly religious, schools than apply to the Federal government.

36. Tribe, 814-9.

37. See Committee for Public Education v. Nyquist, 413 U.S. 756,768 (1973).

. 77 L. Ed. 2d 721 (1983).

39. For example, see Bangor Baptist Church v. State of Maine, 576 F. Supp. 1299 (1983) (no power delegated to prevent unapproved school from operating) and Packer Collegiate Institute v. University of the State of New York, 298 N.Y. 184, 81 N.E. 2d 80 (1948) (unconstitutional delegation of power).

40. 268 U.S. 510, 534 (1925).

41. 262 U.S. 390 (1923).

42. 427 U.S. 160 (1976).

43. Wisconsin v. Yoder, 406 U.S. 205,212 (1972) (suggesting that basic education may be required, including reading, writing and arithmetic); West Virginia State Bd. of Educ. v. Barnette (1943) (stating that it was legitimate for public schools to require instruction in American history, governmental organization and the guaranties of civil liberty).

44. Farrington v. Tokushige, 273 U.S. 284 (1927); State v. Whisner, 47 Ohio St. 2d 181, 351 N.E. 2d 750 (1976).

45. 406 U.S. 205 (1972).

46. 427 U.S. 160 (1976).

47. Hirschoff, "Runyon v. McCrary and Regulation of Private Schools," 52 Ind. L. J. 747 (1977).

48. In a number of recent court decisions upholding state regulations, the challengers did not present evidence to show how compliance with specific regulations, such as curriculum requirements or teacher certification, would conflict with religious tenets or interfere with the teaching of religious

beliefs. Instead, they asserted that the state had no authority to regulate their (Fundamentalist) church schools--that they were subject only to the authority of God, not the state. The state courts uniformly rejected the suggestion that the state's interests could be adequately served by testing the students rather than regulating the schools. See, for example, State v. Rivinius, 328 N.W. 2d 220 (N.D., 1982); State v. Faith Baptist Church, 301 N.W. 2d 571 (Neb., 1981).

In Kentucky State Board v. Rudasill, 589 S.W. 2d 877 (Ky., 1979), however, the Kentucky Supreme Court struck down teacher certification and other regulations governing private schools and held that testing of students was adequate to serve the state's interest in educating children. It relied on a state constitutional provision protecting freedom of conscience.

49. A finding of state action basically means that the government has involved itself with the actions of a private party to such a degree that those actions may be regarded as governmental in nature. Supreme Court decisions do not, however, offer clear rules as to when state action will be found, relying instead on "sifting facts and weighing circumstances." Burton v. Wilmington Parking Authority, 365 U.S. 715,722 (1961). In Norwood v. Harrison, 413 U.S. 455 (1973), the Court held it unconstitutional for a state to loan textbooks to racially discriminatory private schools. Private schools receiving similar types of government assistance would seem to be prohibited from discriminating on the basis of race as well. What remains unclear is whether such assistance would also

require private schools to abide by other constitutional requirements such as following due process procedures in suspending and expelling students.

50. 76 L. Ed. 2d 157 (1983).

51. The opinion thus leaves open the possibility that the direct regulation prohibiting racial discrimination by private schools upheld in Runyon v. McCrary might be successfully challenged on free exercise grounds by such schools.

52. 52 Law Week 4283 (Feb. 28, 1984).

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